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TRANSPORTATION RESEARCH BOARD
COMMITTEE ON ENVIRONMENTAL ISSUES IN TRANSPORTATION LAW (A4006)

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RICHARD CHRISTOPHER, EDITOR
312/793-4838 PHONE
312/793-4974 FAX
E-MAIL ChristopherRA@nt.dot.state.il.us

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CONDEMNEE CAN GET REVIEW OF NORTH CAROLINA EIS IN EMINENT DOMAIN ACTION BUT REVIEW MUST BE TIMELY

In December, 1995 the North Carolina DOT published a Final EIS which adopted Alternative A for some improvements to US 1. The FEIS was required by a State NEPA law. In March, 1996 FHWA approved Alternative A in a Record of Decision under NEPA. In 1999 NCDOT filed actions to condemn land to build Alternative A. Some of the landowners filed counterclaims challenging the adequacy of the FEIS under State and Federal law. The Court held that the landowners were allowed to challenge the decision to pursue Alternative A, but that since this was a State funded job, there was no obligation to follow NEPA. The challenge was limited to the selection of Alternative A and could not be focussed down to the selection of the landowners' property. The landowners had standing and had exhausted administrative remedies, but the petition was not filed within 30 days of the publication of the FEIS. The dismissal of the counterclaim was affirmed. *Department of Transportation v. Blue,* 556 S.E. 2d 609 (N.C. App. 2001)

Note: The trial judge in this case was Catherine Eagles. The Appellate Opinion was written by Chief Judge Eagles. Could someone from North Carolina tell the editor whether these two are related?

KANSAS LOCAL GOVERNMENT CANNOT DO ENVIRONMENTAL TESTING UNDER STATUTE THAT ALLOWS ENTRY FOR SURVEYS

The Unified Government of Wyandotte County/Kansas City filed an eminent domain action against the owner of industrial property and then filed a motion to enter the property under a statute that authorized it to "…make examinations, surveys and maps thereof…" The Unified Government filed a 111 page report that described the need to drill 12 soil borings to a depth of 20 to 25 feet below ground, convert 8 of the borings into monitoring wells, and then collect

samples of soil and water. The landowner objected and pursued injunctive relief. The Supreme Court of Kansas had no prior authority to rely on so it looked to other jurisdictions. The Court reviewed a case from Connecticut that found that the relevant statute authorized borings but required payment of damages; a case from Indiana that did not allow archaeological surveys under a statute much like the one in Kansas; a Missouri case that held that a soil survey amounts to a taking which requires an easement with compensation; and cases from Illinois, Nebraska, and Texas that did not allow borings under a statute much like the one in Kansas. The Court noted that the Kansas legislature had adopted other statutes that specifically authorized core drilling under other circumstances. The Court understood that the environmental condition of the property was relevant to its appraised value but did not allow the subsoil testing because it was not authorized under the statute. *National Compressed Steel Corporation v. The Unified Government of Wyandotte County/Kansas City,* 38 P.3d 723 (Kan. 2002)

NEIGHBORS OF RAILROAD SWITCHING YARD ARE LIMITED IN NUISANCE ACTION FOR NOISE, VIBRATION AND FLOOD DAMAGE

When the neighbors of a railroad switching yard in Rankin County, Mississippi brought an action for nuisance against the railroad, the case was removed to Federal court based on diversity. The nuisance allegations were based on noise from braking and horn blowing, cars slamming into one another and flooding based on the construction of a berm. The Court reviewed the Interstate Commerce Commission Termination Act and concluded that all economic regulation of the railroad industry was vested exclusively with the Surface Transportation Board. Although the laws of negligence and nuisance in Mississippi are an exercise of the police power of the State to safeguard the health and safety of its citizens, these laws cannot be used to impose regulations on railroad operations and thereby result in economic impacts to the railroad. As a result, the counts based on noise and vibration were dismissed. However, the berm (which was constructed to contain noise emissions) does not regulate the way the railroad operates its switchyard. The Court retained jurisdiction to decide whether the design of the berm was causing drainage problems. *Rushing v. Kansas City Southern Railway Co.,* 194 F. Supp.2d 493 (S.D. Miss. 2001)

TEXAS EMISSION CONTROLS ON CONSTRUCTION AND AIRPORT GROUND SUPPORT EQUIPMENT PREEMPTED BY CLEAN AIR ACT

The Texas Natural Resource Conservation Commission (TNRCC) revised the State Implementation Plan (SIP) for ozone in the Dallas-Fort Worth area. The SIP revision would require owners of airports in the area to submit plans to reduce emissions from ground support equipment, would prohibit certain construction equipment from operating from 6:00 a.m. until 10:00 a.m. from June 1 to October 1, and would require operators of construction equipment to accelerate the phase-in of new equipment faster than normal depreciation and the federally mandated minimum useful life of the equipment. The Court found that the morning construction ban and the fleet composition requirements were both preempted by Section 209 (e) of the Clean Air Act and therefore were unenforceable. The opinion did not address the airport ground support equipment plan requirements. *Engine Manufacturers Association, et al. v. Huston, et al.,* 190 F. Supp. 2d 922 (W.D. Tex. 2001)

FAA INCREMENTAL NOISE ANALYSIS INSUFFICIENT FOR FONSI

An airport owned by the City of St. George, Utah could not expand due to geographical limitations. In order to handle projected future demand, the City and FAA proposed to build a replacement airport near Zion National Park. FAA prepared a supplemental noise analysis that compared the noise impacts with the replacement airport and with the existing airport staying in place. Since the difference was not great, FAA used an environmental assessment to support a finding of no significant impact. The opponents sued claiming that the incremental analysis was deficient because it did not include the total noise impact on the Park from other airports and noise sources. The Court remanded the FONSI to FAA on the basis of failure to comply with the CEQ regulations on cumulative impacts. The Court took note of the fact that the National Park Service had identified this Park as one of the nation's most sensitive to noise impacts from overflights. *Grand Canyon Trust v. FAA,* 2002 U.S. App. Lexis 9835, D.C. Cir. No. 01-1154, May 24, 2002

CONNECTICUT TOWN LACKS STANDING TO CHALLENGE RUNWAY RECONSTRUCTION ON AIRPORT INSIDE ITS BORDERS

The Bridgeport-Sikorsky Memorial Airport belongs to Bridgeport, CT but it sits in the neighboring town of Stratford, CT. In order to rebuild and strengthen two runways, the airport needs to build runway safety areas that require the relocation of a State highway that serves as Main Street for Stratford. Some of the work needed to be done on the grounds of an old engine plant that was being decommissioned by the Army. Stratford claimed injury by virtue of adverse travel on the relocated highway but did not assert any environmental interest that would be affected from this injury. As a result, their injury was outside the zone of interests protected by NEPA. This led to a finding that the town lacked standing to bring a NEPA challenge. Stratford's other claims of violations of the Airport and Airways Improvement Act were found to be without merit. *Town of Stratford, CT v. FAA,* 285 F. 3d 84 (D.C.Cir. 2002)

ENVIRONMENTAL CHALLENGE TO FAA DECISION BELONGS IN DISTRICT COURT

A California city and a coalition of citizen groups brought suit in the Ninth Circuit to challenge the development plan for the Oakland airport. The Ninth Circuit transferred the case to the U.S. District Court for the Northern District of California because the challenge had nothing to do with air commerce and safety. FAA made decisions that affected air commerce and safety, but the lawsuit only concerned airport development and noise issues related to compliance with NEPA. *City of Alameda, et al. v. FAA, et al.,* 285 F.3d 1143 (9th Cir. 2002)

ILLINOIS AERONAUTICS ACT NOT PREEMPTED BY FEDERAL LAWS

A coalition of local governments sued to stop the City of Chicago from pursuing improvements to O'Hare Field. The City was proposing new terminals at O'Hare but had not announced any new runways at the time. Illinois DOT interpreted the State law to require a State permit for new runways but not for terminals. The opponents claimed violations of State law (no permit request) on the basis that the terminals would not be needed without new runways and that the City had been planning new runways all along. The Court found that there was sufficient differences on the City's intentions to deny summary judgment. The Court went on to find that the State law was not preempted by the Federal Aviation Act and the Federal Noise Control Act because the State law did not regulate the use of aircraft in navigable airspace. *People ex rel. Birkett, et al. v. City of Chicago,* 2nd District Appellate Court No. 2-00-1232, April 19, 2002.

MANDATORY COMPENSATION FOR SIGNS? MAYBE NOT

Part of the initiation for new State DOT lawyers comes when a local municipality adopts an ordinance which provides an amortization period for nonconforming billboards. The municipality figures that if the nonconforming sign is allowed to stay up for 5-7 years, that should be considered adequate compensation. The new lawyer gets the opportunity to tell the municipality that the State cannot allow the municipality to enforce the amortization ordinance against a sign that is along a controlled route. The municipality never wants to believe that Federal law and the duty on each State to provide "effective control of outdoor advertising" mandate that lawfully erected billboards cannot be removed without paying cash compensation. Once the Federal "fix" is explained, the municipality mumbles that there ought to be a way to break this up. Well, maybe there is. Professor Craig Albert has written "Your Ad Goes Here: How the Highway Beautification Act of 1965 Thwarts Highway Beautification," 48 *Kansas Law Review* 463-544 (April, 2000). The article provides an in depth history of how the Federal government got into the business of outdoor advertising and stuck it to the States. It then goes on to look into the power of Congress to force the States to do something it probably lacked the power to do itself through the conditional spending power. The author contends that the Federal government never kept up its end of the bargain when it stopped appropriating money for the States to remove signs. He suggests that the threatened sanction of a loss of highway funds to States that violate the "fix" is a violation of the Tenth Amendment and that there are extraordinary remedies available to force removal of billboards.

CHAIR'S CORNER

Submitted by Helen Mountford
Helen_Mountford@compuserve.com

By the time this issue reaches you, our July Workshop will be history and we'll be busy planning our sessions for our clients at the January TRB meeting in Washington, D.C., as well as our sessions for fellow attorneys for next July in New Orleans. Our workshops and sessions would not happen if it were not for the excellent work of our committee members, and I deeply appreciate everyone's contributions.

I also continue to thank Rich Christopher for his excellent work in assembling this publication and getting it distributed. *The Natural Lawyer* is the most successful endeavor of our committee and credit for its success rests squarely with Rich. He, of course, needs your contributions, so please keep them coming.

I retired from FHWA in April and moved to the beautiful Santa Ynez Valley close to Santa Barbara on the Central Coast of California. I plan to continue with our committee activities for the near future, so hope to see all our members soon.

NEXT COPY DEADLINE IS SEPTEMBER 16, 2002

Please get your submissions for the October, 2002 *Natural Lawyer* into the Editor by the close of business on September 16, 2002. Please use the e-mail address or FAX number listed at the beginning of the newsletter or mail to Rich Christopher, IDOT, 310 South Michigan, Chicago, IL 60604